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'Dumb Pipe' Or Provider Of Content? AOL Won, But Computer Service Liability Issues Remain Open

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IN THE CASE OF *Ben Ezra, Weinstein, and Company, Inc. v. America Online Inc*, 206 F.3d 980 (10th Cir. 2000), the Tenth Circuit affirmed a judgment holding America Online Inc. (AOL) immune from suit under the Communications Decency Act of 1996, 47 U.S.C. 230 (CDA), for claims arising from the publication of erroneous information on the Internet. Those claims arose out of incorrect information reported by AOL regarding the market price and volume of shares traded in Ben Ezra, Weinstein and Company, Inc. (BW & C), a publicly.

Upon close review, while the Tenth Circuit's decision underscores the broad scope of immunity granted under the CDA to providers of Internet computer services, it leaves unanswered certain questions as to the parameters of that immunity.

Background and Ruling

Section 230(1) of the CDA states that No provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. The statute draws a distinction between an interactive computer service that provides access to the Internet, and information content providers that create or develop information transmitted through the Internet. 47 U.S.C. 230(f)(2) and (3).

Congress enacted the CDA to insulate computer services that merely transmit information from exposure to liability arising from content provided by other entities. Simply stated, the CDA creates a type of Internet service provider immunity to implement public policy objectives clearly set forth in the statute itself. 47 U.S.C. 230 (a) and (b).

As noted, the *Ben Ezra* case arose out of erroneous information reported by AOL on its Internet service regarding the market price and volume of BW & C's stock. BW & C alleged that publication of the erroneous reports amounted to defamation and that it had suffered damages as a result. BW & C also claimed that AOL was not entitled to immunity under the CDA because it had actively participated in the creation and editing of the information in question. As a result, it was charged, AOL was not just an interactive computer service but was, in addition, an information content provider.

Although admitting that it communicated with the companies that provided the erroneous information - ComStock and Townsend - AOL challenged these allegations, asserting that it had never changed, produced or altered any of the information. In the defendant's view, this preserved its statutory immunity.

In affirming an award of summary judgment in favor of AOL, the Tenth Circuit stated that there was no evidence to contradict [AOL's] evidence that ComStock and Townsend alone created the stock information at issue and that BW & C presented no evidence to suggest that [AOL] was responsible, in whole or in part, in the creation and development of the information published on its service. 206 F.3d at 986. Therefore, the panel held that AOL was entitled to immunity under the CDA, and affirmed the district court's dismissal of the case.

Significance of Decision

In taking a broad view of interactive computer service immunity, the Tenth Circuit ensured that the policies that motivated Congress to pass the CDA would not be compromised.

First, the circuit court implicitly recognized, and its decision promotes, the Congressional policy of fostering freedom of speech in the new and burgeoning Internet medium, previously described in *Zeran v. America Online, Inc*., 129 F.3d 327, 330 (4th Cir. 1997), cert. denied, 118 S. Ct. 2341 (1998). A narrow reading of the CDA's immunity protections might result in suppression of speech on the Internet. Free speech often does not survive well in a particular medium if it is subject to constant exposure to the threat of legal liability.

As the district court pointed out, the CDA's immunity provision was enacted in recognition of the fact that placing traditional publisher or distributor liability for defamatory statements on computer services like Defendant AOL's would create an impossible burden requiring the review of literally hundreds of thousands of postings each day for defamatory content and second by second decisions about whether to risk liability by allowing the continued publication of that information.

Ben Ezra, Weinstein, and Company v. America OnLine, Inc., No. 97 Civ. 485, 1999 WL 727402, at *7 (D.N.M. Mar. 1, 1999). By reading the CDA's immunity provisions broadly, the Tenth Circuit significantly reduced the threat of litigation arising out of speech on the Internet, thus removing substantial barriers that could have inhibited the dissemination of such speech.

Second, the panel's decision furthers Congress's goals to encourage service providers to self-regulate the dissemination of offensive material over their services.*Zeran*, supra, 129 F.3d at 331. In enacting the CDA, Congress recognized that interactive service provider immunity was necessary to encourage self-regulation on the Internet. See H.R. Conf. Rep. No. 104-458, at 194 (1996). If the Tenth Circuit had narrowly interpreted the scope of the CDA's immunity provision, self-regulation of Internet computer services would likely be inhibited because

> [a]ny efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially [harmful] material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to the risk of litigation, service providers would likely eschew any attempts at self-regulation.
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> *Zeran*, supra, 129 F.3d at 333.

Thus, by its broad interpretation of the statute's service provider immunity, the *Ben Ezra* decision gives Internet service providers the freedom to investigate and regulate the content of information they publish without fear that, in doing so, they might trip on tort law land mines and subject themselves to liability. As a result, implementation of the Congressional purpose of encouraging self regulation by Internet service providers is facilitated.

Issues Not Addressed

The Tenth Circuit's decision may, however, prove to be equally significant with regard to certain issues that it did not address. Specifically, although the court held that there was insufficient evidence that AOL's participation in the creation and editing of BW & C stock information transformed it into an information content provider, it did not articulate a bright line test specifying precisely when an information service provider's participation would become substantial enough to raise a triable issue of fact concerning its status as such. In failing to do so, the panel left unsettled the outer limits of the CDA's Internet service provider immunity.

In its brief, AOL argued that it would still be immune under the plain meaning of 230 even if it had altered the stock quotation information, so long as ComStock and Townsend provided the information. Brief of Appellee at 36-37 n. 4. According to the Tenth Circuit, however, AOL subsequently conceded at oral argument that, in an appropriate situation, an interactive computer service could also act as an information content provider by participating in the creation or development of information, and thus not qualify for [CDA] immunity.*Ben Ezra*, 206 F.3d at 985 n. 4.

By so doing, AOL appears to have acknowledged that the substantive issue in cases arising under the CDA is not whether an interactive computer service can ever be held liable but, rather, whether the computer service's participation in the development or creation of the information was substantial enough to expose it to wide-ranging discovery, a trial on the merits, and possible liability. The Tenth Circuit provides no guidance as to how courts should make this determination in future cases.[1]

The record in the *Ben Ezra* case reflected certain facts indicating the extent of AOL's participation in the creation and development of the BW & C information and the ramifications of that participation. Although the court concluded that there was no evidence that AOL was responsible in whole, or in part, for the creation of the BW & C stock information, it was undisputed that AOL communicated with ComStock and Townsend on various occasions when it noticed inaccurate information concerning stocks on which it was reporting.

In addition, there was evidence that AOL deleted some stock symbols and other information from its database in an effort to correct those errors. The Tenth Circuit brushed this evidence aside, commenting that BW & C had not demonstrated [that AOL] worked so closely with ComStock and Townsend regarding the allegedly inaccurate stock information that [AOL] became an information content provider. *Ben Ezra*, 206 F.3d at 985.

There was also evidence that some stock information was correct in the ComStock servers located on the ComStock site but, at the same time, incorrect information was being published on AOL's Internet site. Consequently, the court could have found that a disputed issue of material fact existed as to whether AOL had actually changed and edited information received from ComStock and, thus, was acting, at least in part, as an information content provider. Not only did the Tenth Circuit present relatively little analysis of this evidence but, more significantly, it failed to provide guidance as to what type of evidence would suffice to establish that an interactive service provider had become sufficiently involved in the creation or development of information transmitted through the Internet to render it an information content provider, and thus strip it of its immunity under the CDA.

In sum, while the Tenth Circuit's opinion in *Ben Ezra* sheds a great deal of light on the scope of the interactive service provider immunity created by the CDA, it also leaves unanswered significant questions in that regard.

Issues on the Horizon

The facts addressed in *Ben Ezra* were too narrow to be informative on the scope of the statute's interactive service provider immunity. Significantly, the case did not provide any basis for assessing whether different types of Internet service providers ought to be treated differently for purposes of that immunity.

For example, there is no indication that AOL had actively solicited the content of a limited number of information content providers for special placement on its service. Under such circumstances, should an Internet service provider be deemed to have crossed the line into the realm of the information content provider with respect to such content and, as a result, treated differently from one that merely provides a dumb pipe to the Internet? Should that Internet service provider be considered responsible, in whole or in part, for the creation or development of such content; if so, would it be appropriate to shield it from liability for such content? Should the outcome be different if the Internet service provider funds a content creator to develop content exclusively for the paid subscribers of the provider, or if the provider shares the revenues with the content creator from banner advertising or e-commerce transactions derived from the exploitation of the content?

Furthermore, how Internet service providers hold themselves out to the public also may be a significant factor in shielding them from exposure to liability. Should there be a different result for an Internet service provider that holds itself out as having special proprietary content that is unavailable over the Internet if such content is developed by another party? If the objective of the legislation is to hold immune purveyors of entertainment and information that are not the creators or originators of such information, should the same principles apply to other media vehicles that provide content which they do not create? The broadcast networks, for example, do not enjoy such statutory immunity for programming created by others that is disseminated on their networks.

Until the courts address some of these questions, we will not know whether the CDA will have the effect of granting immunity to all Internet service providers, including those that take a more active role in soliciting or funding content in a manner similar to the conduct of broadcast networks, or whether the immunity will be more narrowly drawn to apply solely to Internet service providers that are no more than neutral on-ramps to the Internet.

Furthermore, if it is the case that Congress intended to provide special protection for Internet service providers, regardless of how much they participate in the development of third-party content disseminated over their services, as a means of supporting a nascent Internet service industry, it may be time to question whether such special protection is still merited today, especially now that certain Internet service providers have market capitalizations rivaling the largest media multinationals.

Finally, if the legislation is meant to provide special shelter for computer-based content distribution, should that shelter be extended to benefit existing traditional media companies as they migrate their programming offerings for digital distribution over computer networks?

Answers to these questions must await further decisions construing the CDA.

1. AOL's acknowledgement that there may be circumstances where CDA immunity would not protect an Internet service provider was also noted in *Blumenthal v. Drudge*, 992 F. Supp. 44, 51-52 (D.D.C. 1998), where the court stated that if it were writing on a clean slate unencumbered by a federal statute, it would rule against AOL because AOL had certain editorial rights with respect to the content provided by its co-defendant, whom it affirmatively promoted to prospective subscribers to its service. However, interpreting the CDA statute broadly, the court ruled in favor of AOL's claim of statutory immunity, noting that Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.